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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

GREATER BOSTON TELEVISION CORPORATION, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, WHDH, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Greater Boston Television Corporation, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 13, 1970.

OPINIONS BELOW

Petitioner adopts the statement of the opinions below set forth by the petitioner in *WHDH, Inc., Petitioner* v. *Federal Communications Commission, et al.*, October Term 1970, No. 1622. The opinions below are contained in the appendices A through H to the petition in No. 1622. References to the opinions will be stated as "WHDH Appendix, ——."

JURISDICTION

The judgment of the Court below (WHDH Appendix B(1)) was entered on November 13, 1970. Petitioner's petition for rehearing was denied on February 16, 1971 (WHDH Appendix B(2)). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1), and 47 U.S.C. § 402(j).

QUESTION PRESENTED

Where the Court of Appeals had two cases before it—one an appeal by petitioner from a grant of original TV license by the Federal Communications Commission, and the other an appeal by other persons from a denial of renewal of that original license, was it improper for that Court to decide, or appear to decide only the renewal case and so cut off petitioner's substantial contentions against the validity of the original license upon which the renewal proceeding depended.

STATUTES AND FCC RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), and of the FCC Rules are set forth in WHDH Appendix G, 383a-386a.

STATEMENT

Petitioner is Greater Boston Television Corporation, a Massachusetts corporation which applied in 1953 for television channel 5 in Boston which was then open. In a comparative proceeding, the Chief Hearing Examiner awarded the channel to petitioner in preference to WHDH, Inc. (hereinafter WHDH), and certain other applicants who have since dropped out

of contention. The Commission rejected the Hearing Examiner's award to petitioner, and granted award to WHDH. 22 F.C.C. 767. Four Commissioners (McConnaughy, Mack, Doerfer, and Lee) voted for WHDH; two Commissioners (Hyde and Bartley) dissented; and one Commissioner (Craven) abstained.

Petitioner then appealed to the Court below—petitioner's first appeal in this first case. On its own motion, the Court, while finding no error in the comparative aspects of the case, retained jurisdiction and remanded the case to the Commission for evidentiary hearing on whether Robert Choate, the chief figure in WHDH, had improperly approached any of the Commissioners, and consideration of the effect of any such improper approach on the Commission's award to WHDH. *Massachusetts Bay Telecasters* v. *F.C.C.*, 261 F.2d 55. The Commission found an improper approach by Choate, and on the Commission's recommendation, the Court below vacated the Commission's award to WHDH, and remanded the case for a new determination by the Commission on its reevaluation of the comparative position of the applicants upon a supplemented record. *Massachusetts Bay Telecasters* v. *F.C.C.*, 295 F.2d 131.

The Commission's new determination upon the supplemented record was to award WHDH a construction permit and a license for the limited period of four months. WHDH Appendix D, p. 331a. Petitioner appealed that award to the Court below—its second but last appeal in this first case, and the appeal from which this petition derives. The appeal had been briefed and argued when Robert Choate of WHDH died. While retaining jurisdiction of the appeal, the Court in April, 1964, remanded for evidentiary hear-

ing, consideration and report on the effect of Mr. Choate's death on the Commission's award to WHDH. The Court observed that such remand was indicated

> . . . where, as here, awards appear to have been made upon a close margin in a closely contested comparative consideration and because the Commission's findings reflect that the late Mr. Choate was an important factor favorable to WHDH and also was the cause of the demerit against that applicant . . . [WHDH Appendix C, pp. 47a, 84a].

Meanwhile, WHDH had applied for renewal of the four-months' license awarded to it by the Commission's still *unreviewed* decision in this first case, and the Commission had set a date for the filing of applications by those desiring to compete against WHDH in the renewal proceedings (this second case is hereinafter called "the renewal case"). WHDH Appendix D, p. 83a. In remanding the first case, and so postponing its review of the four-months' license award to WHDH, the Court below stated that, although the parties to the first case and the renewal case would not be the same, evidence of the effect of Choate's death on WHDH might be material to both cases; and, hence the Court authorized the Commission to combine some or all of the features of both cases, and, particularly, to "adopt a procedure which would permit the taking of this evidence [effect of Choate's death] only once." At the same time, the Court carefully noted:

> Of course the renewal proceedings assume an initial license to WHDH. If upon reconsideration upon this record the Commission decides not to award the initial license to WHDH, the renewal proceedings lose their appropriateness." [WHDH Appendix C, pp. 50a-51a]

Pursuant to the Court's mandate, the Commission consolidated the first proceeding and the renewal proceeding "for the limited purpose of taking evidence as to the effect of Choate's death on the WHDH applications in these proceedings." WHDH Appendix D, p. 85a.

Petitioner was not a party to the renewal case which included WHDH and three new competing applicants.

Upon hearing, the Hearing Examiner, in one decision covering both cases, concluded that no material changes had been made by WHDH as a result of Choate's death and hence the four-months' license award to WHDH should not be changed; observed that the comparative phases of the first case had been closed ten years before; erroneously treated Greater Boston TV Co., Inc., one of the three new applicants and a party to the renewal case, as "the substantial equivalent" of petitioner which was not a party to the renewal case;[1] speculated that "there is little chance" the Court of Appeals would sustain "a full-time grant" to either petitioner or WHDH on "a stale record" in the first case; and, upon a comparative evaluation only of the renewal case awarded WHDH renewal of the four-months' license which had been granted by the Commission, and from which grant petitioner's appeal was still pending in the Court of Appeals. WHDH Appendix D, pp. 259a-261a, 302a.

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[1] Petitioner was incorporated in 1952. Greater Boston TV Co., Inc, was incorporated in 1963. Fourteen of its forty stockholders have never had any connection with petitioner. Its President and Treasurer and two of its directors have never had any connection with petitioner. WHDH Appendix D. pp. 138a-140a.

The Hearing Examiner made no comparative evaluation of the two contestants, petitioner and WHDH, in the first case. And, on review, neither did the Commission. The Commission adopted the Hearing Examiner's individual findings, but in the renewal case found for Boston Broadcasters, Inc. The Commission made no change in its four-months' license award to WHDH in the first case, and filed its opinion with the Court of Appeals as its report in compliance with the Court's remand of the first case. WHDH Appendix D, pp. 52a-71a. Various parties to the renewal case appealed to the Court of Appeals.

At that point, the Court of Appeals had appeals in both cases before it—petitioner's appeal in the first case from the Commission's four-months' license award to WHDH which appeal had been retained in the Court's jurisdiction, and the appeals in the renewal case. At the consolidated argument before the Court, petitioner's counsel in the short time allotted him endeavored to get the Court to focus on the fact of there being two cases before it. The decision of the Court of Appeals affirmed the Commission's award to Boston Broadcasters, Inc., in the renewal proceeding. But its decision and opinion are devoid of any consideration of, or even reference to the serious questions raised by petitioner's appeal and argument in the first case. Those questions include:

> 1. Whether the Commission in its four-months' license award to WHDH erroneously failed to make Choate's improper approach a "determinative comparative disadvantage"[2] against WHDH

[2] The FCC Broadcast Bureau so characterized it in its 1961 argument to the Commission in favor of a grant to petitioner.

in the comparative proceedings between petitioner and WHDH;

2. Whether in the admittedly (see p. 4, *supra*) close comparative contest between petitioner and WHDH, the Commission's conclusion in favor of WHDH was supported by substantial evidence, particularly in view of Choate's improper approach and, in our view, the adverse effect of Choate's death on WHDH's application for construction permit; and

3. Whether petitioner's rights as one of the two contestants in the first case are lawfully eliminated by the Commission's award of license to the other contestant in that case, followed, while that award was under appeal, by a grant to a third party in license renewal proceedings to which petitioner was not a party.

The opinion of the Court below makes no formal statement that issues not discussed have been considered and decided.

REASONS FOR GRANTING THE WRIT

The decision of the Court below effectively deprived petitioner of its right to its day in that Court, and, hence, so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision in correction of a denial of procedural due process. In asserting this ground for granting the writ, we do not accuse the Court below of intentionally depriving petitioner of its day before it. We do urge on the facts of record that in the busyness of the Court below as applied to the complexities of the Boston Channel 5 multiple litiga-

tion petitioner's right to that Court's decision on the questions petitioner presented got lost in the shuffle. We set forth the stark facts which show the rightness of petitioner's appeal to this Court's power of supervision.

Petitioner is Greater Boston Television Corporation, a live, separate and distinct entity which is neither the same corporation as, nor the predecessor of Greater Boston TV Co.[3] In a comparative proceeding for award of a construction permit for the open Boston Channel 5 (hereinafter called "the first case"), the Hearing Examiner awarded the permit to petitioner in preference to WHDH, and certain other applicants who have since dropped out of contention. The Commission rejected the Hearing Examiner's award of construction permit to petitioner, and granted a construction permit to WHDH.

Petitioner then appealed to the Court below—petitioner's first appeal in this first case. On its own motion, the Court, while finding no error in the comparative aspects of the case, retained jurisdiction and remanded the case to the Commission for evidentiary hearing on whether Robert Choate, the chief figure in WHDH, had improperly approached any of the Commissioners, and consideration of the effect of any such improper approach on the Commission's award to WHDH. The Commission found an improper approach by Choate, and on the Commission's recommendation the Court below vacated the Commission's award to WHDH, and remanded the case for a new determination by the Commission on its reevaluation

[3] For clarity of statement, dates and references are omitted here, but are set forth in the Statement (*supra*, pp. 2-6).

of the comparative position of the applicants upon a supplemented record.

The Commission's new determination upon the supplemented record was to award WHDH a construction permit and a license for the limited period of four months. Petitioner appealed that award to the Court below—its second but last appeal in this first case, and the appeal from which this petition derives. To this day, as will appear, the Court below has never decided that appeal in this first case. The appeal had been briefed and argued when Robert Choate of WHDH died. While retaining jurisdiction of the appeal, the Court remanded for evidentiary hearing, consideration and report on the effect of Mr. Choate's death on the Commission's award to WHDH. The Court observed that such remand was indicated

> . . . where, as here, awards appear to have been made upon a close margin in a closely contested comparative consideration and because the Commission's findings reflect that the late Mr. Choate was an important factor favorable to WHDH and also was the cause of the demerit against that applicant . . . [WHDH Appendix C, pp. 47a, 84a]

Meanwhile, WHDH had applied for renewal of the four-months' license awarded to it by the Commission's still *unreviewed* decision in this first case, and the Commission had set a date for the filing of applications by those desiring to compete against WHDH in the renewal proceedings. In remanding the first case, and so postponing its review of the four-months' license award to WHDH, the Court below stated that, although the parties to the first case and the renewal case would not be the same, evidence of the effect of Choate's death on WHDH might be material to both

cases; and, hence the Court authorized the Commission to combine some or all of the features of both cases, and, particularly, to "adopt a procedure which would permit the taking of this evidence [effect of Choate's death] only once." WHDH Appendix, p. 51a. At the same time, the Court carefully noted:

> Of course the renewal proceedings assume an initial license to WHDH. If upon reconsideration upon this record the Commission decides not to award the initial license to WHDH, the renewal proceedings lose their appropriateness." [WHDH Appendix C, pp. 50a-51a]

Pursuant to the Court's mandate, the Commission consolidated the first proceeding and the renewal proceeding "for the limited purpose of taking evidence as to the effect of Choate's death on the WHDH applications in these proceedings." WHDH Appendix D, p. 85a.

Petitioner was not a party to the renewal case.

Upon hearing, the Hearing Examiner, in one decision covering both cases, concluded that no material changes had been made by WHDH as a result of Choate's death and hence the four-months' license award to WHDH should not be changed; observed that the comparative phases of the first case had been closed ten years before; erroneously treated Greater Boston TV Co., a party to the renewal case, as "the substantial equivalent" of petitioner which was not a party to the renewal case; opined that "there is little chance" the Court of Appeals would sustain "a full-time grant" to either petitioner or WHDH on "a stale record" in the first case; and, upon a comparative evaluation only of the renewal case awarded

WHDH renewal of the four-months' license which had been granted by the Commission, and from which grant petitioner's appeal was still pending in the Court of Appeals. WHDH Appendix D, pp. 259a-261a, 302a.

The Hearing Examiner made no comparative evaluation of the two contestants, petitioner and WHDH, in the first case. And, on review, neither did the Commission. The Commission adopted the Hearing Examiner's individual findings, but in the renewal case found for Boston Broadcasters, Inc. The Commission made no change in its four-months' license award to WHDH in the first case, and filed its opinion with the Court of Appeals as its report in compliance with the Court's remand of the first case. Various parties to the renewal case appealed to the Court of Appeals.

At that point, the Court of Appeals had appeals in both cases before it—petitioner's appeal in the first case from the Commission's four-months' license award to WHDH which appeal had been retained in the Court's jurisdiction, and the appeals in the renewal case. At the consolidated argument before the Court, petitioner's counsel in the short time allotted him unsuccessfully endeavored to get the Court to focus on the fact of there being two cases before it. The decision of the Court of Appeals affirmed the Commission's award to Boston Broadcasters, Inc., in the renewal proceeding. But its decision and opinion are devoid of any consideration of, or even reference to the serious questions raised by petitioner's appeal and argument in the first case. Those questions include:

1. Whether the Commission in its four-months' license award to WHDH erroneously failed to

make Choate's improper approach a determinative comparative disadvantage against WHDH in the comparative proceedings between petitioner and WHDH;

2. Whether in the admittedly close comparative contest between petitioner and WHDH, the Commission's conclusion in favor of WHDH was supported by substantial evidence, particularly in view of Choate's improper approach and, in our view, the adverse effect of Choate's death on WHDH's application for construction permit; and

3. Whether petitioner's rights as one of the two contestants in the first case are lawfully eliminated by the Commission's award of license to the other contestant in that case, followed, while that award was under appeal, by a grant to a third party in license renewal proceedings to which petitioner was not a party.

The foregoing questions do not present such issues as lend themselves to *sub silentio* consideration and decision; and the opinion of the Court below makes no formal statement that issues not discussed have been considered and decided. Rather plainly, the issues presented by petitioner's appeal in this first case were overlooked by the Court below and not decided. If that were doubtful, this Court should nevertheless in the exercise of its supervisory power grant the writ and remand for explicit decision on petitioner's appeal in the first case so that even the appearance of partial and improper adjudication, however unintentional, may be eliminated.

CONCLUSION

The petition for certiorari should be granted, and the case remanded to the Court below for explicit consideration and decision on the issues raised by petitioner on its appeal from the Commission's grant of the original four-months' license to WHDH.

Respectfully submitted,

J. JOSEPH MALONEY, JR.
31 Milk Street
Boston, Massachusetts 02109
Counsel for the Petitioner

JOSEPH A. FANELLI
1511 K Street, N. W.
Washington, D. C. 20005
Of Counsel

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